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| **BOARD OF APPEALS CASE NO. 5061** | * | **BEFORE THE** |
| **APPLICANT: Harford Health Ventures LLC** | * | **ZONING HEARING EXAMINER** |
| **REQUEST: Special Exception and variance to locate an assisted living facility on less than 5 acres; 3309 Emmorton Road, Bel Air** | * | **OF HARFORD COUNTY** |
| | * | **Hearing Advertised** |
| | * | **Aegis: 6/28/00 & 7/5/00** |
| **HEARING DATE: August 2, 2000** | | **Record: 6/30/00 & 7/7/000** |
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# ZONING HEARING EXAMINER'S DECISION

**The Applicant,, Harford Health Ventures, LLC, is requesting a special exception pursuant to Section 267-53(F)(7) of the Harford County Code, to permit an assisted living facility in an R2/Urban Residential District. Because the Applicant's property cannot meet the requirements of Section 267-53(F)(7) as to minimum lot size (5 acres required), the Applicant seeks a variance, pursuant to Section 267-11 of the Harford County Code to allow the proposed facility to be built on a lot that is less than the required 5 acres.**

**The subject property is located on the east side of Maryland Route 924 north of the Box Hill South Parkway. The parcel is more particularly identified on Tax Map 61, Grid 1F, Parcels 359 and 387. The parcel is located entirely within the First Election District.**

**First to testify was Mr. Gary Raffel, Chief Executive Officer of Raffel Health Care Group and Harford Health Ventures. Mr. Raffel testified that his company proposed to build and operate an assisted living facility on the subject property. He stated that 40-45 employees would work at the facility on shifts spanning 24 hour days. The witness testified that this was an excellent location for an assisted living facility like the one proposed because, (1) there was a lot of tree cover; (2) there was access to shopping and leisure facilities close by; (3) there is a senior housing facility directly behind the proposed location; (4) 2 acres minimum is required for such a facility and this has nearly 5 acres and, (5) there is water/sewer service provided to the property.**

**The witness went through the Guides and Limitations set forth in Section 267-9I of the Harford County Code and did not find any adverse impacts associated with this facility when considering those guides and limitations. The witness described the difficulty in locating a 5 acre lot that met all of the requirements of this type of facility. He described an almost identical facility with which his company is involved that is on only 3 acres. His research did locate other properties that could be used for the facility planned but, according to the witness, none of those properties met all of the requirements as this parcel does.**

**Mr. Dudley Campbell appeared and qualified as an expert in site plan design. He described the parcel by referring to the Applicant's Plat. There is a wetland area to the NE and there is a forest buffer on 3 sides of the property. All of the setbacks set forth in the Code will be met and the use is consistent with the master Plan. Mr. Campbell then discussed the details of his opinion regarding the uniqueness of the parcel which he set forth in writing in a document entitled, "Uniqueness of the Property" (Applicant's Exhibit 12). This document sets forth 11 reasons which form the basis of the witness's testimony that the subject parcel meets the test of uniqueness set forth in Section 267-11 of the Harford County Code. On cross examination, the witness stated further that it would be an unreasonable hardship on the Applicant if it were required to find another suitable property, buy another property or seek re-zoning of the subject parcel. This is particularly true since this property falls short of the 5 acre requirement by only 0.297 acres. The witness discussed other Assisted Living Facilities that have been built on fewer than 5 acres, although admittedly, they were on property with zoning classifications different than the subject parcel.**

**Mr. Anthony McClune appeared on behalf of the Department of Planning and Zoning (Department). The Department's position, according to Mr. McClune, is that the proposed facility meets all of the requirements of the Code for such a special exception use except the 5 acre minimum lot size requirement. According to Mr. McClune, the 0.297 acre shortfall is very minimal and should be treated as an area variance request and not a use variance.**

**Mr. McClune opined that the Department believes the subject parcel is unique in that it has wetlands present, NRD area, heavy forest and is, with one exception, surrounded by more intense zoning classifications. Mr. McClune pointed out that the reason a 5 acre minimum is required is because it is anticipated that there would be other residential uses surrounding an R2 parcel, however, that is not the case in regard to this property[1]. The witness concluded by stating that the Department recommends approval of the requested special exception and variance subject to 6 conditions as set forth in the staff report dated July 11, 2000[2].**

**There were no citizens who appeared in opposition to the subject request, however, People's Counsel did appear in opposition to the request and provided further legal briefing in the matter at hand.**

## CONCLUSION:

**The Applicant is seeking a special exception pursuant to Section 267-53(F)(7) of the Harford County Code to construct an Assisted Living Facility in an R2/Urban Residential zone. Additionally, since the Code requires a minimum 5 acre lot size for the special exception grant, the Applicant, pursuant to Section 267-11 is seeking a variance to allow the facility to be built on less than 5 acres (4.703 acres proposed).**

**Section 267-51 provides:**

> **"Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1."**

**Section 267-52 provides:**

> **A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.**

[1] "The Zoning Classifications in this area are consistent with the 1996 Master Plan and 1996 Land Use Element Plan. The Zoning classifications consist of RO /Residential Office to the south, R2 and R4 Urban Residential to the east and west, B3 /General Business to the north, and CI/Commercial Industrial on the south side of Box Hill South Parkway." Staff Report dated July 11, 2000.

[2] The Applicant's witness stated that the Applicant did not agree with conditions numbers 4 and 5 and proposed modifying the language to add, "except as may be modified by the requirements of the Department of Natural Resources"

**B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.**

**C. Extension of any use or activity permitted as a special exception shall require further Board approval.**

**D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.**

**E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.**

**Section 267-53(F)(7) provides:**

**"Nursing homes and assisted living facilities. These uses may be granted in the AG, RR, R, R1, R2, VR, VB and B1 Districts, provided that:**

**(a) A minimum parcel area of five acres is established and a maximum building coverage of 40% of the parcel is provided.**

**(b) The setbacks of the district for institutional uses shall be met.**

**(c) The density shall not exceed 20 beds per acre of the parcel."**

**The Harford County Code, pursuant to Section 267-11, provides:**

**"Variances from the provisions or requirements of this Code may be granted if the Board finds that:**

**(1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.**

**(2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest."**

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**The Applicant proposes to build and operate an Assisted Living Facility on the subject parcel. The Applicant has met all of the requirements of the Harford County Code for such a use in an R2 zone with the exception that the parcel size falls below the 5 acre minimum. The Applicant proposes a 4.703 acre lot size.**

**The standard to be applied in reviewing a request for special exception use was set forth by the Maryland Court of Appeals in Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319 (1981) wherein the Court said:**

> **"...The special exception use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible *absent any facts or circumstances negating the presumption.* The duties given the Board are to judge whether the *neighboring properties in the general neighborhood would be adversely affected* and whether the use in the particular case is in harmony with the general purpose and intent of the plan.**
>
> **Whereas, the Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the Board that that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the Board to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal. (Citations omitted). These standards dictate that if a requested special exception use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied." (Emphasis in original).**

**The Court went on to establish the following guidelines with respect to the nature and degree of adverse effect which would justify denial of the special exception:**

> **"Thus, these cases establish that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone." 291 Md. At 15, 432 A.2d at 1327.**

**Based on all of the testimony and a review of the "Limitations, Guides and Standards" set forth in Section 267-9I of the Code, the Hearing Examiner concludes that this special exception use at this particular location will not have any adverse impacts above and beyond those inherent with such a use, regardless of its location within the R2 zone. Generally, if there were not a variance requested, the above analysis would end the inquiry. However, the Harford County Code provides that the requested use in this zone must have a minimum of 5 acres. Admittedly, this property falls short of the 5 acre minimum by a small amount (0.297 acres), The inquiry is whether the Hearing Examiner has the ability to grant a variance that serves to modify the specific conditions set forth in the Code for this use. Presumably, the County Council had very specific criteria in mind when the various specific requirements for each type of special exception was set forth in the Code. However, the legislative body also set forth criteria allowing variances from other provisions of the Code, among them, Section 267-11 which allows area variances under certain circumstances. The question then is whether the Hearing Examiner, through the Administrative functions of that office, may recommend the grant of a variance that effectively alters the specific requirements of the statute. In other words, are the provisions set forth in Section 267-53 and particularly 267-53(F)(7), minimum requirements that must be met as a prerequisite to a finding that a particular use is a permitted one, or, can those requirements be modified, on a case by case basis, by way of variance.**

**It is generally accepted that a special exception is, "... a grant by an administrative body pursuant to the existing provisions of the zoning law and subject to certain guides and standards, of a special use permitted under the provisions of the existing zoning law. Rezoning or reclassification is, of course, *a change in the existing law itself*, so far as the subject property is concerned." Cadem v. Nanna, 243 Md. 536, 543, 221 A.2d 703, 707 (1966). " A special exception is a use which has been legislatively predetermined to be *conditionally compatible* with the uses permitted as of right in a particular zone, the condition being that a zoning body must, in each case, decide under specified statutory standards whether the presumptive compatibility in fact exists. Creswell v. Baltimore Aviation Service, Inc., 257 Md. &12, 719, 264 A.2d 838, 842 (1970).**

**In the instant case the County Council acting in its legislative capacity has set forth certain conditions which, if met, presume that the enumerated use is a permitted use within a particular zone. In the instant case, the 5 acre minimum requirement has not been met. The Applicant argues that this condition may be modified by the grant of a variance and the very minimal lessening of this restriction requested in this case makes a compelling argument for easing this restrictive condition. However, simply because this case presents such a minimal lessening of the stated requirement, the Hearing Examiner must consider whether the same compelling argument would exist if this parcel were 2 or 3 acres or substantially less than the required 5 acres. Is the grant of the requested variance a permitted administrative function or an impermissible legislative act? There is some precedent for finding the latter.**

**In Kassab v. Burkhardt, 34 Md. App. 699, 368 A.2d 1064 (1977) the Maryland Court of Appeals stated, "An applicant for a special exception must meet all conditions precedent to the grant of such use. In the instant case, planned unit development provisions requiring that evidence be submitted to demonstrate that the subject development will be served by public water and sewage disposal systems which exist at the time of the plan is submitted for approval must be literally interpreted. The courts may not attempt, under the guise of construction, to supply omissions or remedy possible defects in the statute or insert exceptions not made by the legislature. Here the requirement was stated in unambiguous manner and was not susceptible to statutory construction."**

**"A special exception or conditional use involves a use which is permitted, once certain statutory criteria have been satisfied." Mossburg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995). Perhaps the concept was most succinctly stated by the Maryland Court of Special Appeals in County Commissioners of Queen Anne's County v. Soaring Vistas Properties, Inc., 121 Md. App. 140, 708 A.2d 1066 (1998) wherein the Court stated. " The terms "conditional use" and "special exception use" are frequently interchanged. Conditional uses are permitted uses, *so long as the conditions set out in the zoning ordinance are satisfied*." Emphasis added.**

**In Chester Haven Beach Partnership v. Board of Appeals for Queen Anne's County, 103 Md. App. 324, 653 A.2d 532 (1995), the Maryland Court of Special Appeals addressed a special exception use wherein the Applicant also requested a variance from the specific provisions of the statute allowing such a special exception use. The case is so similar to the request before the hearing Examiner, the opinion is set forth at some length.**

> **"In the subject case, in order to qualify for a conditional use approval, an applicant must seek a variance from the density and cluster provisions in order to satisfy conditions of the ordinance to be entitled to a conditional use. *An applicant may not eliminate the conditions required to achieve a conditional use by obtaining a variance therefrom.*[emphasis added]**
>
> **The attempt to follow this procedure creates fundamental and conceptual problems with the generally accepted proposition that, if the expressed conditions necessary to obtain a conditional use are met, it is a permitted use because the legislative body has made that policy decision...the application for a conditional use becomes dependent upon the granting of the variance. Under those circumstances, the presumption that a conditional use is permitted may well fall by the wayside. The policy that establishes certain uses as permitted is predicated upon the satisfaction, not avoidance, of conditions."**

**While the Hearing Examiner agrees with the Applicant that the amount of acreage representing the shortfall from the statutory requirement is minimal, only 0.297 acres, nonetheless, the legislative body of Harford County has predetermined that this use is permitted as a special exception when certain specific and unambiguous conditions are present. The assumption must be that when those enumerated conditions are not met, the special exception use is not presumptively permitted. Consequently, the Hearing Examiner, despite the uniqueness of the property[3], and the compatibility of the proposed use with other uses in the surrounding neighborhood, finds that the applicant, as a condition precedent to approval, must meet the specific conditions set forth in Section 267-53(F)(7) of the Code. Having failed to meet those conditions, the Hearing Examiner is unable to provide administrative relief and recommends, therefore, that the special exception be denied.**

**Even if the Hearing Examiner were empowered to recommend a grant of the relief requested, it is important to note that, in the opinion of the Hearing Examiner, the Applicant has failed to meet its burden in regard to its request for a variance, which, based on the change in use that will result, is more in the nature of a use variance than an area variance and subject to a far greater burden of proof. (See footnote 3 herein).**

**In conclusion, the Hearing Examiner recommends denial of both the variance and the special exception.**

**Date SEPTEMBER 20, 2000**

**William F. Casey**
**Zoning Hearing Examiner**

[3] The Hearing Examiner does find that the subject property is unique because of many of the reasons stated by the Department and the applicant's expert, particularly the fact that the property is zoned R2 yet represents an island within a surrounding sea of more intensely zoned and commercially used properties. Normally, such uniqueness would compel the Hearing Examiner to recommend approval of a requested area variance, however, the request herein is more of a use variance than an area variance and the standards required for a grant of a use variance are significantly different than those of an area variance. Anderson v. Board of Appeals, Town of Chesapeake Beach, 22 Md. App. 28, 322 A.2d 220 (1974). There is no showing in this case that the applicant could not obtain a reasonable economic return on the property or make reasonable use of the property. It was clear to the hearing Examiner that this property was compatible with many other uses and the difficulty is inherent in the particular use to which the applicant proposes to make of the property.